In the Court of Appeals of the State of Alaska

Fred Michael Esguerra Jr., Petitioner, v. **State of Alaska,** Respondent.	Court of Appeals No. **A-13819** **Order** Motion for Full Court Reconsideration Date of Order: **August 5, 2021**

Trial Court Case No. **3AN-19-04854CR**

Before: Allard, Chief Justice, and Wollenberg and Harbison, Judges.

The Petitioner, Fred Michael Esguerra Jr., is currently represented by the Public Defender Agency. This order addresses the Public Defender Agency's motion for full-court reconsideration of a single judge's order remanding this case to the superior court for an evidentiary hearing on the Public Defender Agency's motion to withdraw as counsel because of a perceived positional conflict. For the reasons explained in this order, we grant, in part, the motion for full-court reconsideration and hereby vacate the evidentiary hearing scheduled for August 9, 2021. The Public Defender Agency has 10 days to file a supplemental affidavit providing the information described in this order. Upon receipt of that supplemental pleading, the Court will rule on the original motion to withdraw.

Procedural background

On May 18, 2021, approximately six weeks after filing a docketing statement for a petition for review in Esguerra's case, and after receiving extensions to file the petition, the Public Defender Agency filed a motion seeking to withdraw from representing Esguerra on the ground that the Agency has a "positional conflict" with

regard to Esguerra's petition. The motion to withdraw provided no facts regarding the perceived positional conflict and no detail of the underlying litigation that led to the petition.

The State opposed the Agency's motion, arguing that the Agency had not provided enough information to support its claim of a positional conflict.

In an order dated June 2, 2021, a single judge of this Court remanded this case to the superior court to determine whether the Public Defender Agency has a positional conflict of interest in this matter, and if so, to appoint the Office of Public Advocacy to represent Esguerra before this Court.

The Public Defender Agency then filed a motion for full-court reconsideration, requesting that the remand for an evidentiary hearing be vacated and the original motion to withdraw be granted.

In the motion for reconsideration, the Agency provides a little more information regarding the perceived "positional conflict." According to the Agency, Esguerra's petition for review will present the legal question of whether "findings made at hearings in petitions to revoke probation are binding in future prosecutions on related charges." The Agency asserts that Esguerra's position — that such findings are binding — is in conflict with "at least one current case" in which the Agency is arguing the opposite position — *i.e.*, that such findings are *not* binding. The motion for reconsideration does not provide any further information about Esguerra's case or the other case, although its motion suggests that the other case is in the trial court because the Agency defines the "positional conflict" as arising from the fact that "the Agency would be advocating for one position in a tribunal with the authority to issue a decision binding on the other tribunal."

In the motion for reconsideration, the Agency argues that it is not required to provide a factual basis when it moves to withdraw based on a perceived positional conflict and it asserts that the lack of detail in its original motion is intentional and "carefully avoids undermining either client's position in their respective cases." According to the Agency, this Court should simply accept the Agency's representation, as officers of the court, that a positional conflict of interest exists, and grant the Agency's request to withdraw without any additional fact finding.

Upon receipt of the Public Defender Agency's motion for reconsideration, this Court issued an order soliciting the position of the Office of Public Advocacy, the agency that would be appointed to represent Esguerra if the Public Defender Agency's motion to withdraw is granted.

The Office of Public Advocacy filed a response arguing that the Public Defender Agency "should be required to provide additional information about the factual basis of the asserted conflict, unless disclosing the factual basis would involve disclosing a client's confidential information." The Office of Public Advocacy further argued that, "[i]f the Public Defender determines that public disclosure of that basis would be contrary to one or more client's interests, it should be allowed to make the disclosure in either a sealed hearing or a sealed pleading." The Office of Public Advocacy based its position on the need for judicial oversight of alleged conflicts, and the lack of clarity or consensus regarding what constitutes a positional conflict necessitating withdrawal of the Public Defender Agency.

This Court also granted the State's request to file a response to the Agency's motion for reconsideration. The State's response included a much fuller discussion of the trial court litigation that led to Mr. Esguerra's petition for review. The

State also attached some of the relevant pleadings to its response. Like the Office of Public Advocacy, the State took the position that the Public Defender Agency could not just rely on its own blanket assertion that a positional conflict existed; instead, to ensure adequate judicial review of its claim, the Agency should be required to provide a sufficient factual basis for its claim that a disqualifying positional conflict exists.

Why we conclude that the Public Defender Agency must supplement its pleadings with additional information regarding the perceived positional conflict

Alaska Rule of Professional Conduct 1.7(a) provides that "a lawyer shall not represent a client if the representation involves a concurrent conflict of interest." The rule further provides that a concurrent conflict of interest exists if "there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client, or a third person or by a personal interest of the lawyer."[1]

In the current case, the Public Defender Agency has asserted that it has a "positional conflict" with regard to Esguerra's petition for review. A positional conflict of interest can arise when the same legal issue is present in two otherwise unrelated matters and the interests of one client require the lawyer to argue a position that is directly adverse to the interests of the other client in the other matter.[2]

As a general matter, the mere fact that a lawyer may be required to argue

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[1] Alaska R. Prof. Conduct 1.7(a)(2).

[2] *See Williams v. State*, 805 A.2d 880, 881 (Del. 2002); *see also* John S. Dzienkowski, *Positional Conflicts of Interest*, 71 Tex. L. Rev. 457, 460 (1993) (addressing positional conflicts of interest in the context of a private law firm).

opposing sides of a legal issue in two unrelated matters does not necessarily constitute a conflict of interest requiring withdrawal from either matter. As the Commentary to Rule 1.7 states:

> Ordinarily a lawyer may take inconsistent legal positions in different tribunals at different times on behalf of different clients. The mere fact that advocating a legal position on behalf of one client might create precedent adverse to the interests of a client represented by the lawyer in an unrelated matter does not create a conflict of interest.[3]

However, a lawyer is required to inform his or her clients and/or seek withdrawal "if there is a significant risk that a lawyer's action on behalf of one client will materially limit the lawyer's effectiveness in representing another client in a different case" — as, for example, "when a decision favoring one client will create a precedent likely to seriously weaken the position taken on behalf of the other client."[4]

Factors that are relevant in determining whether there is a significant risk that the lawyer's effectiveness will be materially limited include: "where the cases are pending, whether the issue is substantive or procedural, the temporal relationship between the matters, the significance of the issue to the immediate and long-term interests of the clients involved and the clients' reasonable expectations in retaining the lawyer."[5] "If there is significant risk of material limitation, then absent informed consent of the affected clients, the lawyer must refuse one of the representations or withdraw

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3 Alaska R. Prof. Conduct 1.7 cmt. para. 23.

4 *Id.*

5 *Id.*

from one or both matters."[6]

This Court previously addressed positional conflicts in *Holt v. State*.[7] In that case, we recognized that the Public Defender Agency had a positional conflict with regard to representing Holt in the Alaska Supreme Court, but we disagreed with the Public Defender Agency's claim that it had a positional conflict with regard to representing Holt in our Court.[8]

Holt's appeal raised a number of different issues, including the admissibility of a defense polygraph test. We separated the polygraph issue from the other issues and certified the polygraph issue to the Alaska Supreme Court to consolidate that portion of Holt's case with another case, *Alexander v. State*, which was pending before the Alaska Supreme Court.[9] The specific legal question pending before the Supreme Court in both cases was whether an appellate court should review a trial court's ruling on the admissibility of a polygraph test *de novo* or under an abuse of discretion standard. Alexander's interests were directly adverse to Holt's interests on this legal question. Alexander advocated for an abuse of discretion review because the trial court in his case ruled that the defense polygraph test was admissible. In contrast, Holt advocated for a *de novo* review because the trial court in his case ruled that the defense polygraph test was inadmissible. Because the two cases were pending before the same tribunal at the same time, and because the Public Defender Agency was appointed to represent both

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6 *Id.*

7 *Holt v. State*, File No. A-12219 (Order dated Nov. 21, 2016).

8 *Id*.

9 *See Alexander v. State*, Supreme Court File No. S-16193.

clients, we agreed with the Public Defender Agency that a positional conflict existed and that the Agency could not represent opposing sides of the same legal issue at the same time.[10]

However, we disagreed with the Public Defender Agency that it had a positional conflict with regard to the remainder of Holt's appeal, which was still pending before our Court. The Agency viewed the conflict as arising from the fact that Holt would be aware that the Agency was arguing a legal position in Alexander's case that was adverse to Holt's position in his case before the supreme court. But we rejected such a broad interpretation of what constitutes a disqualifying "conflict." As we stated:

> The Public Defender Agency is a statewide network of lawyers who represent thousands of clients each year. We would seriously impede the functioning of this statewide agency if we held that a conflict was created every time one Agency attorney argued a legal position that, if adopted, would disfavor other Agency clients in unrelated cases.[11]

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[10] *Holt*, File No. A-12219 (Order dated Nov. 21, 2016). *Cf. Williams v. State*, 805 A.2d 880, 881 (Del. 2002) (accepting attorney's claim of disqualifying positional conflict where both cases were pending at the same time before the same tribunal and would have required attorney to argue opposing sides of the same legal question).

[11] *Holt*, File No. A-12219 (Order dated Nov. 21, 2016). *Cf.* Helen A. Anderson, *Legal Doubletalk and the Concern with Positional Conflicts: A "Foolish Consistency"?*, 111 Penn St. L. Rev. 1, 4 (2006) (noting that a rule against positional conflicts does not help clients of public defender agencies and that "[a]n excessive concern with avoiding positional conflicts in these kinds of cases could lead to unnecessary withdrawal of quality counsel, which is generally scarce"); John S. Dzienkowski, *Positional Conflicts of Interest*, 71 Tex. L. Rev. 457, 540, n.329 (1993) (noting that "a positional conflict involving public-interest law services or reform activities should be narrowly construed to protect lawyers' involvement in these activities").

Accordingly, because we had "no reason to believe that the Agency's briefing [of Holt's other issues on appeal] was tainted by the positional conflict that the Agency is now asserting with regard to the polygraph issue," we denied the Public Defender Agency's motion to withdraw from representing Holt in his appeal pending before our Court.[12]

In the current case, we have the same concern that we voiced in *Holt* — that the Agency may be applying too broad an interpretation of what constitutes a disqualifying positional conflict and that this overly broad interpretation may harm the interests of the indigent defendants that the Agency serves.

The Agency's apparent response to this concern is to assert that we should just trust its judgment and accept its claim of a positional conflict without requiring any additional information. We reject this position as contrary to the judicial oversight that such claims require.[13]

To be clear, we do not intend the Agency to breach any of its duties of confidentiality to its clients and we believe that the Agency should be able to provide enough information for us to fairly assess the alleged conflict without requiring any confidential information. For example, it is not clear why the Agency could not have provided us with the underlying pleadings in Mr. Esguerra's case so that we would have a better understanding of the legal issue on petition. Likewise, it is not clear why the Agency cannot provide us with the pleadings in the other conflicting case so that we can

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[12] *Holt*, File No. A-12219 (Order dated Nov. 21, 2016).

[13] *See Holloway v. Arkansas*, 435 U.S. 475, 487 (1978) (recognizing court's authority to "explor[e] the adequacy of the basis of defense counsel's representations regarding a conflict of interests without improperly requiring disclosure of the confidential communications of the client").

assess whether the legal positions in the two cases are truly in opposition. (We note that arguing that res judicata and/or double jeopardy should attach to a trial court's finding of no probation violation does not necessarily suggest that res judicata should similarly attach to a trial court's finding of a probation violation given the different burdens of proof that are at stake.)

In sum, the Agency needs to give us sufficient background on the two cases for us to understand why it believes that its representation in one case will be "materially limited" by its representation in another case. This information should include, at a minimum, the information needed to assess the factors that should be considered when determining whether a disqualifying positional conflict exists: "where the cases are pending, whether the issue is substantive or procedural, the temporal relationship between the matters, the significance of the issue to the immediate and long-term interests of the clients involved and the clients' reasonable expectations in retaining the lawyer."[14]

The Agency should also make clear whether it is seeking to withdraw only from representing Esguerra in the petition for review or whether it intends to withdraw as his attorney in the on-going trial court proceedings. In addition, the Agency should explain why withdrawing from Mr. Esguerra's case, rather than the other case, is the appropriate action to take in this case given the time-sensitive nature of a petition for review and the fact that the Agency has already received multiple extensions of time to prepare its petition for review. Lastly, the Agency should explain whether it has considered seeking a waiver from both clients so that it can proceed with both

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[14] Alaska R. Prof. Conduct 1.7 cmt. para. 23.

representations with the informed consent of both clients.[15]

To the extent that the Agency believes that providing this information may harm the interests of either client, the Agency will be allowed to provide this information in an *ex parte* pleading under seal. To the extent that the Agency believes that it cannot provide this information without violating its duty of confidentiality, the Agency should explain exactly why it believes that is the case.

We note that this case is currently scheduled for an evidentiary hearing before Superior Court Judge Erin B. Marston on August 9, 2021. We conclude that there is no need for an evidentiary hearing because resolution of this issue does not require credibility findings. Instead, the Public Defender Agency may provide the additional information we require directly to this Court through an affidavit.

Accordingly, it is ORDERED:

The Public Defender Agency's motion for full-court reconsideration of the single judge order is GRANTED in part. The evidentiary hearing is VACATED and jurisdiction is returned to this Court. The Public Defender Agency has 10 days to file any supplemental affidavit with this Court addressing the concerns outlined in this order.

Entered at the direction of the Court.

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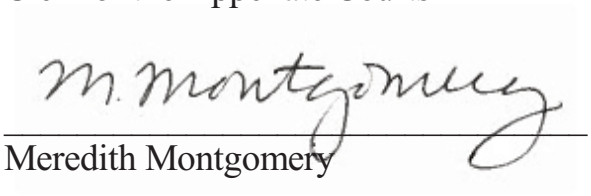
[15] *See* Alaska R. Prof. Conduct 1.7(b).

Clerk of the Appellate Courts



Meredith Montgomery

cc: Judge Marston
Trial Court Clerk - Anchorage

Distribution:

Email:
Goldstein, Melissa Hope, Public Defender
Rosenstein, Kenneth M.